LEGISLATING THE INCUMBENT OUT OF OFFICE.

UNDER the English common law the officer's right or interest in the office which he held was regarded as a property right, an incorporeal hereditament.[1] Largely because of the inherent difference between the nature and incidents of the public office at common law and those of the public office in this country, this conception never gained general acceptance here.[2] In a few cases,[3] and particularly in the decisions of the courts of North Carolina,[4] offices have been asserted to be the property of the rightful incumbent. In these decisions the officer's right has been regarded as less absolute, perhaps, than that of BLACKSTONE'S conception, but these courts have insisted that it is none the less a property right. Nevertheless they have recognized the power of the legislature to abolish an office[5] and to decrease,[6] though perhaps not to abolish,[7] the compensation thereof during the term of the incumbent. They have further limited the officer's property in the office and its perquisites by recognizing his lack of power and authority to sell or assign the office or to delegate to another the performance of its duties.[8]

A consideration of these limitations on the meaning of the word "property" as a designation of the right which the lawful incumbent has to the office and the incidents thereof leads one to the conclusion that the value of the term as descriptive of the relation is

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[1] Blackstone's Comm. 36. See article on Recovery of Salary by De Facto Officer, 10 Mich. Law Rev. 291.

[2] Taylor and Marshall v. Beckham (1899), 178 U. S. 548; Conner v. Mayor of New York (1851), 5 N. Y. 285; Donahue v. County of Will (1881), 100 Ill. 94; State v. Henderson (1910), 145 Iowa 657, 124 N. W. 767; State v. Hawkins (1886), 44 Ohio St. 98, 109; State v. Dews (1835), R. M. Charlton (Ga.) 397.

[3] Wanmack v. Holloway (1841), 2 Ala. 31, 33. With regard to this case Justice Sanford of the New York Superior Court, 4 N. Y. Sup. Ct. Rep. (2 Sanf.) 355, 370, said, "In that case, this remark (that the right to exercise office is as much a species of property as any other thing capable of possession) is rather a figure of speech than a judgment, determining an office to be property. It was a strong mode of expressing the right which one elected to an office has to hold and enjoy it, as against all intruders and unfounded claims; which is as perfect a right, beyond doubt, as the title of any individual to his property, real or personal. But the nature of that right, and its liability to control by legislative action, is quite a different thing."

Mayor and Aldermen of Memphis v. Woodward (1873), 59 Tenn. (2 Heisk.) 499, 501; Dodd v. Weaver (1855), 34 Tenn. (2 Sneed) 669, 670; Cameron v. Parker (1894), 2 Okla. 277.

[4] Hoke v. Henderson (1833), 15 N. C. 1, 25 Am. Dec. 677; King v. Hunter (1871), 65 N. C. 603, 609; Bunting v. Gales (1877), 77 N. C. 283, 285; Wood v. Bellamy (1897), 120 N. C. 212, 217.

[5] Wood v. Bellamy (1897), 120 N. C. 212.

[6] Cotten v. Ellis (1860), 52 N. C. (7 Jones) 545.

[7] Cotten v. Ellis (1860), 52 N. C. (7 Jones) 545.

[8] Wood v. Bellamy (1897), 120 N. C. 212, 217.

practically destroyed by the exceptions or limitations, and that its use in this connection is consequently unfortunate. It is rather singular that the inappropriateness of using this term to describe a relation which, by his own definition, lacked so many, and bore so few, of the characteristics of property as we commonly know it did not occur to the learned justice[9] who first announced the doctrine in this country. That a term so inappropriate and so misleading and which the courts of North Carolina recognized for so long a time[10] should not have led to more frequent mistakes in construing the law of officers than it did, is remarkable but fortunate. Except for the instance furnished by the case in which the relation of the officer to his office was first designated as that of the owner of property and in which it was decided that the law-making body cannot legislate an officer out of office without abolishing the office,[11] only one or two instances of the deleterious influence of the term on the law of officers can be found in the decisions of the courts of North Carolina. The most evident of these is a principle which is the natural corollary of that established in the case of *Hoke* v. *Henderson,* i. e., that though the legislature may reduce the salary of an office during the term of an incumbent, it cannot wholly abolish it, as this would be doing by indirection what the court in the *Hoke* case held the legislature could not do directly.[12]

When the Supreme Court of North Carolina in the case of *Mial* v. *Ellington*[13] refused to recognize the doctrine of property in an office and therefore to deny the power of the legislature to remove the officer without abolishing the office, and in so doing expressly overruled the *Hoke* case, it seems that this case should have been rendered incapable of further harm in this country as a precedent, but that this has not been the result we shall attempt to show further along in this article.

In general, as has been hereinbefore said, the doctrine that a public office is the property of the lawful incumbent has found no support in this country. Our courts have been equally unanimous in their refusal to accept the doctrine that on the election or appointment of a citizen to an office and his acceptance thereof, a contract arises between him and the state which in a measure restrains the

[9] Chief Justice Ruffin in Hoke v. Henderson (1833), 15 N. C. 1.

[10] The officer's right to his office was regarded as property by the North Carolina courts until 1903, when the case of Mial v. Ellington (1903), 134 N. C. 131, was decided overruling Hoke v. Henderson and the North Carolina cases following it.

[11] Hoke v. Henderson (1833), 15 N. C. 1.

[12] Cotten v. Ellis (1860), 52 N. C. 545.

[13] (1903), 134 N. C. 131.

legislature from interfering with the office or officer.[14] As a result of these views as to the nature of the officers's right to office, the legislature has been conceded practically unlimited authority and control over offices, except in so far as their power is limited by the constitution of the state where it is called in question. Many limitations are placed on the power of the legislature in this respect by the constitutions of the various states. The commonest of such provisions are those which forbid the increase or decrease of the compensation of an officer during the term for which he has been chosen,[15] and those which prohibit a shortening or lengthening of the term of office during the incumbency of one chosen to office before the passage of the act.[16] These and other less common constitutional provisions[17] accomplish what the North Carolina courts attempted to do by decision. Although the prevalence of constitutional restrictions of the sort mentioned above have occasionally led persons who have examined the law hastily to regard these limits as inherent characteristics of an officer's right to the office, it is manifest that in the absence of constitutional restrictions the legislature has absolute control over statutory offices and may abolish them,[18] may change the salaries thereof by increasing, diminishing or abrogating them,[19] may lengthen or shorten the terms thereof,[20] may add to or take away from the duties either with or without

[14] Newton v. Commissioners (1879), 100 U. S. 548, 559; Conner v. Mayor of New York (1851), 5 N. Y. 285, 296; City Council of Augusta v. Sweeney (1871), 44 Ga. 463; Butler v. Pennsylvania (1850), 10 How. 402; Commonwealth v. Bacon (1821), 6 Serg. & Rawle 322; Locke v. City of Central (1878), 4 Colo. 65; City of Hoboken v. Gear (1859), 27 N. J. L. 265; Farwell v. Rockland (1872), 62 Maine 290, 299; Barker v. City of Pittsburgh (1846), 4 Pa. St. (4 Barr) 49; Harvey v. Board of Com'rs (1884), 32 Kan. 159; Loving v. Auditor of Public Accounts (1882), 76 Va. 942.

[15] Iowa Const., Art. V, sec. 9; Kansas Const., Art. I, sec. 15, Art. III, sec. 13; Illinois Const., Art. V, sec. 23.

[16] This is accomplished where the Constitution prescribes the length of the time of office. Iowa Const., Art. IV, sec. 2; New York Const., Art. IV, sec. 1; Michigan Const., Art. VI, sec. 1.

[17] For citations to constitutional provisions of various sorts, see Stimson, Federal & State Constitutions of the United States.

[18] City Council of Augusta v. Sweeney (1871), 44 Ga. 463; Farwell v. Rockland (1872), 62 Maine 296, 299; People v. Auditor (1838), 2 Ill. (1 Scammon) 537; Prince v. Skillin (1880), 71 Maine 361, 36 Am. Rep. 325; Bryan v. Cattell (1864), 15 Iowa 538; Reid v. Stevens, (1910), 126 N. Y. S. 379, 70 Miscl. 177.

[19] Butler v. Pennsylvania (1850), 10 How. 402; Commonwealth v. Bacon (1821), 6 Serg. & Rawle 322; Farwell v. Rockland (1872), 62 Maine 296, 299; Barker v. City of Pittsburgh (1846), 4 Pa. St. (4 Barr) 49, 51; Conner v. Mayor of New York (1851), 5 N. Y. 285; County of Douglas v. Timme (1891), 32 Neb. 272; Harvey v. Board of Com'rs (1884), 32 Kan. 159; Fredericks v. Board of Health (1912), — N. J. L. —, 82 Atl. 528.

[20] Farwell v. Rockland (1872), 62 Maine 296, 299; Taft v. Adams (1854), 69 Mass. (3 Gray) 126; State v. Ure (1912), — Neb. —, 135 N. W. 224.

increasing or diminishing the salaries thereof,[21] and all of these changes may be made to take effect during the terms of the incumbents who were serving when the acts were passed as well as at the close of such terms.[22]

In the face of so many decisions conceding to the legislature such a broad power over offices which that body has created, it is difficult to understand how any further question of the right of legislative control could have arisen. There are, however, a few comparatively recent cases which have questioned the right of the law-making body to legislate an incumbent out of office by abolishing the office and in the same or a concurrent act re-creating the office under a different name with substantially the same duties.[23] If the courts in these cases mean to assert that by abolishing the office under one name and re-creating it under another no legislative intent to remove the incumbent of the old office is exhibited, and that consequently the incumbent of the old office becomes the incumbent of the new for the remainder of his term, we agree that their interpretation would be reasonable under certain statutes. But if they mean to say, as they undoubtedly do, that, in the absence of limitations imposed by the state constitution, the legislature has not the power by a properly worded statute to remove an officer before the end of his term and appoint or provide for the appointment of a person to immediately succeed him, they are in error. If the power to remove and appoint another without cause be conceded to the legislature, it is clear that it can accomplish this result by a properly worded statute abolishing an office under one name and re-creating it under another. So long as the North Carolina courts took the view that an office is the property of the lawful incumbent, they were consistent, at least, in holding that the legislature could not summarily and without cause remove an incumbent from office without in good faith abolishing the office. The change in the current of authority in that state caused by the overruling in *Mial* v. *Ellington*[24] of the case of *Hoke* v. *Henderson* and the later North Caro-

[21] State v. Dews (1835), R. M. Charlton (Ga.) 397; Atty. Gen. v. Squires (1859), 14 Cal. 13; State v. Board of Com'rs (1899), 23 Mont. 250.

[22] Taft v. Adams (1854), 69 Mass. (3 Gray) 126; Commonwealth v. Bacon (1821), 6 Serg. & Rawle 322; Barker v. City of Pittsburgh (1846), 4 Pa. St. (4 Barr) 49, 51; Conner v. Mayor of New York (1851), 5 N. Y. 285; State v. Dews (1835), R. M. Charlton (Ga.) 397; Board of Com'rs (1899) 22 Ind. App. 60; Touart v. State (1911), 173 Ala. 453, 56 South 211.

[23] Malone v. Williams (1907), 118 Tenn. 390; State Prison v. Day (1899), 124 N. C. 362, 32 S. E. 748, 46 L. R. A. 295; Wood v. Bellamy (1897), 120 N. C. 212, 27 S. E. 117.

[24] (1903), 134 N. C. 131.

lina cases following it[25] should have put an end to the use of those earlier cases as authorities in the support of the principle of limited legislative control over offices. This has not been the result, however, as is shown by the case of *Malone* v. *Williams*,[26] decided in 1907. In this case the court held that the legislature could not abolish, during the term of the incumbent, an office which they had created and in the same act re-create it under another name with practically the same duties as it had borne before, and require it to be filled by a special election. This amounts to saying that an officer cannot be legislated out of office, *i. e.*, removed from office by the legislature, unless the office is abolished with a bona fide intent to discontinue it. The court referred to no clause of the constitution of the state which limited the power of the legislature over the office in question, and there appears to be none having that effect. In reaching its conclusion the court relied on certain Tennessee cases[27] as authorities for the principle that an office is the property of the lawful incumbent. Though certain loose statements to that effect are found in the opinions in these cases, all that is really decided by these cases is that the lawful claimant to an office who is kept out of it by another claimant has a right thereto which may be enforced[28] in a civil proceeding[29] and may sue and recover the salary which he would have received had he served.[30] There is nothing in the facts or opinions in these cases to indicate that anything further was meant by these loose statements than simply to express in an emphatic way the right which the lawful claimant has to the office as against one who has intruded therein.

In *Malone* v. *Williams* the court lays great stress on the decisions of the North Carolina court, on the question of an officer's right to office, from *Hoke* v. *Henderson*[31] down to and including *State Prison* v. *Day*,[32], without mention, however, of *Mial* v. *Ellington*.[33] And

[25] State Prison v. Day (1899), 124 N. C. 362, 32 S. E. 748, 46 L. R. 295; Wood v. Bellamy (1897), 120 N. C. 212; King v. Hunter (1871), 65 N. C. 693; Cotten v. Ellis, (1860), 52 N. C. (7 Jones) 545.

[26] (1907), 118 Tenn. 390.

[27] Dodd v. Weaver (1855), 34 Tenn. (2 Sneed) 670; Memphis v. Woodward (1873), 59 Tenn. (12 Heisk.) 499, 27 Am. Rep. 750; Moore v. Sharp (1896), 98 Tenn. 65, 38 S. W. 411; Nelson v. Sneed (1903), 112 Tenn. 36, 83 S. W. 788; Mahoney v. Collier (1903), 112 Tenn. 78, 83 S. W. 672. See also Boring v. Griffith (1870), 48 Tenn. (1 Heisk.) 456.

[28] Dodd v. Weaver (1855), 34 Tenn. (2 Sneed) 670.

[29] Mahoney v. Collier (1903), 112 Tenn. 78; Nelson v. Sneed (1903), 112 Tenn. 36. See also Boring v. Griffith (1870), 48 Tenn. (1 Heisk.) 456; and Anderson v. Gossett (1882), 77 Tenn. (9 Lea) 644.

[30] Memphis v. Woodward (1873), 59 Tenn. (12 Heisk.) 499, 27 Am. Rep. 750.

[31] (1833), 15 N. C. 1.

[32] (1899), 124 N. C. 362, 32 S. E. 748, 46 L. R. A. 295.

[33] (1903), 134 N. C. 131.

the court is correct in its conclusion that these decisions, with the exception of the last, uphold the principle which it asserts in this case. Thus the bad influence of these early North Carolina cases continues.

As further authority for its stand the Tennessee court cites certain cases decided by the courts of Utah, Kentucky and Louisiana.[34] In referring to these cases as authority the court overlooked the fact that in all but one of them the decision against the power of the legislature was based on the ground that the acts in question were in contravention of certain provisions of the state constitution protecting the term of the officer.[35] The court in *Malone* v. *Williams* made the same mistake with respect to a certain Tennessee case which it cites in support of its conclusion.[36]

A Utah case cited by the court in support of the principle asserted in *Malone* v. *Williams* is undoubtedly correctly decided and at first glance seems to uphold the Tennessee case.[37] In this case the city council of Ogden under legislative authority had created the office of captain of police, and the relator before the court had been appointed thereto. Subsequently an ordinance was passed discharging the relator and (as was claimed) abolishing the office. Within ten days thereafter an ordinance was passed making provision for the same office and for the appointment of an officer to fill the place. An officer was appointed under the second ordinance and a dispute arose as to which of the two claimants was entitled to hold the office. The Utah court held that the second ordinance was invalid and that the original officer was entitled to the office. In his opinion Chief Justice BARTCH said, "An officer whose term is during good behavior, or who can only be removed for cause, cannot thus be legislated out of office." The statute delegating the power to the city council to create the office and to provide for the appointment of an officer, also provided for the removal of such appointee for cause. The Utah court's decision rested on an interpretation of this statute and it construed the provision for removal for cause to exclude removal summarily. Manifestly the legislative delegation of power here bore much the same relation to the power of the

[34] State v. Wiltz (1856), 11 La. Ann. 439; Adams v. Roberts (1904), 119 Ky. 364, 83 S. W. 1035; Silvey v. Boyle (1899), 20 Utah 205, 52 P. 602.

[35] State v. Wiltz (1856), 11 La. Ann. 439; Adams v. Roberts (1904), 119 Ky. 364, 83 S. W. 1035. In both of these cases it was held that a constitutional provision fixing the term of office prohibited the legislature from removing the incumbent therefrom before the expiration of his term without in good faith abolishing the office.

[36] State v. Leonard (1887), 86 Tenn. 485, 7 S. W. 453.

[37] Silvey v. Boyle (1899), 20 Utah 205, 52 Pac. 602. See also to same effect, Wilson v. Mayor and Council of Dalton (1910), 135 Ga. 240, 69 S. E. 163.

council as a constitutional provision bears to the power of the legislature.

Summing up, it appears that the conclusions of the court in *Malone* v. *Williams* are supported by the decisions of the court of North Carolina alone. It is only fair to the Tennessee court to say that its judgment in this case was largely based on other reasons than those to which we have referred and there is consequently no quarrel with the result reached therein. The doctrine and principles of that case in respect to the law of officers, however, are entirely erroneous and are, and were, unsupported by any cases not overruled in the jurisdictions in which they were decided. It is to be hoped that the doctrine that the office is the property of the lawful incumbent and that the power of the legislature to deal therewith is limited by this principle will end with this case. The power of the legislature over offices, as it is in general, is absolute except as limited by constitutional provisions, and the motive inspiring the legislative act regulating an office should not be considered by the court[38] unless there is a veiled attempt to avoid some constitutional restriction.

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[38] State v. Lindsay (1899), 103 Tenn. 625, 630.